No. 5131

United States Circuit Court of Appeals

For The Ninth Circuit

CHARLES ROMEO, AUGUST BIANCHI, JOHN GATT, FRANK GATT and ROMEO TRONCA,

Plaintiffs in Error,

—VS.—

UNITED STATES OF AMERICA,

Defendant in Error.

ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

PETITION FOR REHEARING

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To the Honorable Judges of the Above Entitled Court:

Come now the plaintiffs in error and respectfully petition the court to grant a rehearing in this case, and in support of their petition represent as follows:

I

In the opinion filed herein on the 23rd day of January, 1928, the court while holding that the action of the trial judge in refusing to allow the wife of Frank Gatt, one of the defendants, to testify was erroneous, announced as law that the error was not available to the plaintiffs in error because there was no offer of testimony made. On this point the opinion reads:

"The enquiry as to the place of residence of the

witness suggested no answer material to the issues, and even if the court's ruling was assigned as error, there could have been no error unless the attention of the court had been directed to the nature and relevancy of the evidence ought to be added."

This is not the law. There is a wide distinction between the competency of a witness to testify and the competency of evidence.

State v. Von Klein (Ore.), 142 Pac. Rep. 549;

Hoag v. Wright (N. Y.), 66 N. E. Rep. 579.

If an objection is sustained to the evidence of a witness, the ruling cannot be reviewed unless the record discloses an offer to prove by the witness facts relevant to the issues.

Sarkisian v. United States, 3 Fed. (2d.) 599.

If, however, the trial court refused to permit a witness to testify at all because in his judgment he is incompetent as a witness, the error will be reviewed, although no offer of testimony is made.

9 Ency. of Evidence, 164;

38 Cyc., 1331;

Martz Ex. v. Martz (Va.), 25 Gratt. 361;

Mutual Ins. Co. v. Oliver (Va.), 28 S. E. Rep. 594;

Metz v. Snodgrass, 9 W. Va. 190;

Sutherland v. Hawkins, 56 Ind. 323;

State v. Thomas (Ind.), 13 N. E. Rep. 35;

Foree v. Smith (Ky.), 1 Dana 151.

"Where the question is not the competency of the testimony expected to be elicited, but the com-

petency of the witness to testify at all, the party offering the witness is not required to state what he expects to prove by the witness."

9 Ency. of Evidence, 164, *supra.*

"Ordinarily, when a question is asked and the witness is not permitted to answer it, the record must show what the party expected or proposed to prove by the witness, in order to have the action of the trial court reviewed by the appellate tribunal [citing cases]. Where, however, it is not a question of the relevancy or materiality of the testimony, but a question of the competency of the witness, and whether he shall be permitted to testify at all, though his testimony be ever so relevant and material, it was held in *Martz. Ex. v. Martz Heirs*, 25 Gratt. 307, that it is not necessary to state in the bill of exception what the testimony of the witness would be in order to have the action of the court in excluding him reviewed by the appellate tribunal. The fact that he was excluded by the court, upon an objection being made to his testimony by the adverse party, implies that it would be unfavorable to such party."

Mutual Ins. Co. v. Oliver, supra.

"But it is argued that the exception is not well taken, inasmuch as it does not state what was offered to be proved by the witness. It is not a case as to the relevancy of testimony, as in *Carpenter v. Utz*, 4 Gratt. 270, cited by appellee counsel. If it were, it would have been necessary for the exceptor to have shown its relevancy by set-

ting out what could be proved by the witness. But it is a question whether the witness shall be heard at all, though his testimony be ever so relevant and important. It is not necessary to state what his testimony would be in order to present to the appellate tribunal the question as to the legality and propriety of the decision of the lower court; and the adverse party objecting to his giving testimony at all, implies that his testimony would be unfavorable to him."

Martz Ex. v. Martz, supra.

"When a party complains, in this court, of the exclusion of offered evidence by a lower court, we have often held, that such party must show, by a bill of exception properly in the record, what the evidence was which had been excluded. * * * But, in our opinion, there is a wide and marked difference between the questions decided in those cases and the question presented by the record of this case. * * * The matter complained of by the appellants, in this court, was not the exclusion of any particular evidence, but the absolute refusal of the court below to allow a certain witness to testify at all, in the case. Where offered evidence is excluded, it must be made a part of the record before this court can pass upon the question whether the court below has or has not erred in its exclusion. But where, as in this case, the matter complained of is the action of the court, in refusing to allow a witness to testify at all, the grounds of objection to the witness must be shown by a bill of exceptions, and this is all

that need be shown in order to present the matter for our consideration."

Sutherland v. Hawkins, supra.

The ground of objection to Mrs. Gatt's testimony was that she was the wife of one of the defendants on trial; the objection and the ruling of the trial court sustaining it is properly preserved in the bill of exceptions; the objection was urged by the Government and this warrants the implication that the testimony excluded was important, relevant and favorable to the defendants.

The case of *Rendleman v. United States*, 18 Fed. (2d.) 27, is controlling and calls for a reversal of this case. It is worthy of mention that the record in the *Rendleman* case shows that the same questions were asked the witness as in this case, to-wit, her name and address, and that no offer of proof was made or permitted.

That no special assignment of error was made is answered by this and other court's holdings in numerous recent decisions, that in criminal cases manifest prejudicial error will be reversed and corrected, even though not preserved by exceptions or assignments of error.

Bilvoa v. United States, 287 Fed. 125;
Wiborg v. United States, 163 U. S. 632;
Davis v. United States, 9 Fed. (2d) 826;
Schwartz v. United States, 10 Fed. (2d) 900;
Shields v. United States, 17 Fed. (2d) 66;
Van Gorder v. United States, 21 Fed. (2d) 939;
Lamento v. United States, 4 Fed. (2d) 901;
McNutt v. United States, 267 Fed. 670.

II

A majority of the court, in the concurring opinion, holds that the testimony of Agent Whitney concerning reports to him by Rossi, a defendant, not on trial, were inadmissible and so prejudicial as to call for a reversal had timely objection been made. Such objection was made, not once, but repeatedly, and these objections were followed, first, by a request that the trial court instruct the jury to disregard such testimony, and, secondly, *by a motion to strike the same from the case.* The plaintiffs in error, in their efforts to exclude this improper and highly prejudicial evidence, seem to have exhausted every reasonable effort, and the blame for the unfair trial which resulted should be placed upon the trial judge where it properly belongs. In criminal cases, the correct rule to be applied is clearly stated in *Sutherland v. United States*, 19 Fed. (2d) 202, 216:

> "Though the record does not show that any objection was taken in relation to some of the matters mentioned, yet in pursuing the broad inquiry, whether a fair trial was had, we feel at liberty to examine the record as a whole without regard to objections."

In the present case, the record as a whole discloses that the plaintiffs in error did not have a fair trial, that is, a trial conducted in all material things in substantial conformity to law, and that they repeatedly tried to protect their rights in the premises. A reference to the record substantiates this claim:

> "AGENT WHITNEY: Rossi further stated to the witness that in December, 1924, and January,

1925, that either Frank Gatt or John Gatt would come each morning and get the money.

MR. DORE (for Defendants): We ask the jury be instructed that this testimony only goes as against the defendant Rossi, it cannot be taken to establish any fact against any other defendant.

MR. MCKINNEY (for the Government): This is a conversation I understand prior to the determination of the conspiracy.

Q. (By THE COURT): When was the conspiracy?

A. (WHITNEY): It was in the fall of 1924 or early part of January, 1925.

THE COURT: Very well, go ahead.

MR. DORE: I renew the request. Is the request for such an instruction denied at this time?

THE COURT: At this time.

MR. DORE: Note an exception.

Witness (continued): Mr. Rossi also stated that in 1925, a few days before the raid he was working under the direction of the Gatts, and Frank Gatt in particular, and was collecting from other bootlegging establishments which Frank Gatt and John Gatt operated out of the Monte Carlo and was furnishing liquor and collecting thousands of dollars a month, and turned it over to Frank Gatt as protection and graft money from these institutions and brought it up to the office and turned it over to Frank Gatt in the office of the Monte Carlo.

MR. DORE: I move that the testimony be strick-

en and the jury instructed to disregard it as incompetent, irrelevant and immaterial.

THE COURT: With relation to the collection of the graft money, that may be stricken.

MR. DORE: Note an exception.

THE COURT: Note it." (Trans. 69, 70)

In the light of the record, it is not fair to say that this "testimony was admitted without objection," and we feel that the court on maturer consideration will agree with us that the plaintiffs in error, through their attorney, did everything that was humanly possible to keep this prejudicial testimony away from the jury.

> "A fair trial consists not alone in an observance of the naked forms of law, but in a recognition and just application of its principles."
>
> *State v. Pryor*, 67 Wash. 219.

In the celebrated case of *Bram v. United States*, 168 U. S. 540, the defendant objected twice before the witness was permitted to answer, but failed to renew his objection after the answer had been given, and in answer to the contention that the objection had been waived the Supreme Court said:

> "To say that under these circumstances the objection which was twice presented and regularly allowed should have been renewed at the termination of the testimony of the witness, would be pushing to an unreasonable length the salutary rule which requires that exceptions be taken at the trial to rulings which are considered erroneous, and the legality of which are thereafter to be questioned on error. There can be no doubt that the manner in which the exception was al-

lowed and noted fully called attention to the fact that the admission of the conversation was objected to because it was not voluntary, and the overruling of this objection is the matter now assigned as error here."

In the present case the objection urged *called the attention* of the trial court to the fact that the testimony of Whitney concerning admissions and statements of Rossi was inadmissible against his co-defendants, and this was emphasized by the motion to strike this testimony after it had been given. Consequently, the error is reviewable in this court. Nor can any just fault be found with the form of the objection, for it is well settled law that where testimony is inadmissible, and could not under any state of facts be rendered admissible, a general objection is sufficient to present for review the question of the admission of such evidence.

Safford v. United States, 233 Fed. 499.

III

In his closing argument to the jury the attorney for the Government went beyond the limits of proper argument and deliberately went outside of the record for the obvious purpose of arousing prejudice against the defendants in the minds of the jury. This was reversible error.

Fontanello v. U. S., 19 Fed. (2d) 921.

In that case the misconduct was mild and innocuous compared with the misconduct in the present case, yet, in reversing, this court said:

"It is beyond question that the statements of

the district attorney were unjustifiable and censurable. As an officer of the court he signally failed in his duty to act in the interest of justice."

The same situation is presented by the record in this case, as follows:

"MR. REVELLE (District Attorney): When you find a crowd of men like these men in your city, some of them not naturalized, according to the testimony, when you find them together,—

MR. DORE (for Defendants): I object to that as improper argument, and ask the jury to be instructed to disregard it.

THE COURT: The jury will conclude upon the evidence, not conjecture.

MR. REVELLE: These defendants are charged with conspiracy, they have taken the stand in their own behalf, three of them, and we tried to examine them on certain things connected with that place; we tried to show you that this place was raided and Frank Gatt came and pleaded guilty, and the court would not let us do it—

MR. DORE: I object to that as improper argument, and ask the jury be instructed to disregard it.

THE COURT: You will conclude upon the evidence." (Trans. 82, 83)

This was gross misconduct and prejudicial to the defendants, and it was the duty of the court, when challenged, to direct the jury, in *unequivocal language*, to disregard it. It was objectionable for two reasons. In the opening part of the argument quoted the district attorney urged a conviction because the

defendants were foreigners, an argument which this court denounced in the *Fontanello* case. And in the closing part he urged upon the attention of the jury matters which were not in evidence, matters which had been rejected when offered.

> "It is not within the legitimate province of counsel to state facts pertinent to the issue that are not in evidence; nor can he assume in argument that such facts are in the case when they are not, and counsel cannot be permitted to make a statement of facts which under the rules of evidence would not be received, if offered, the natural tendency of such facts being to influence the findings of the jury."
>
> *Lowden v. U. S.*, 149 Fed. 673.

Standing alone, the remarks of the district attorney warrant a reversal of this case, but taken in connection with the improper rejection of the testimony of Mrs. Gatt and the admission of the highly prejudicial hearsay testimony of Agent Whitney, it is clear that the plaintiffs in error were not accorded a fair trial and their conviction was illegally secured.

We respectfully submit that a rehearing and reconsideration of this case should be granted and upon such rehearing the judgment of the trial court reversed.

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Attorneys for Plaintiffs in Error.

The foregoing petition for rehearing is, in my opin-

ion, meritorious and well founded in law and is not interposed for the purpose of delay.

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